

LEONARD KOCI)	
Claimant)	
VS.)	
)	
COLLECTIVE BRANDS, INC.)	Docket No. 1,041,212
Respondent)	
AND)	
)	
ZURICH AMERICAN INSURANCE COMPANY)	
Insurance Carrier)	

The incident of April 29, 2008 was a sudden and unexpected event, causing immediate pain and should be found to be the date of accident for the right knee

complaints. Notice of the April 29, 2008 event was not given within ten days and the claim should be denied.

The arthritic condition in Claimant's knees results from the aging process and body habitus of Claimant and is the reason treatment is necessary. Going up and down four steps or eight steps per half-hour is not a repetitive activity and an injury caused by climbing is an ordinary activity of everyday life. The event of April 29, 2008 should be considered a natural progression of the November 2002 work injury sustained by Claimant combined with his 60 years of age and his pre-existing arthritis and his body weight of 245 pounds. Problems with his left knee should be considered to be the natural progression from his left knee injury and surgery of 1991, not from the climbing he did at work.¹

Accordingly, respondent requests the Board to deny claimant's request for benefits.

Conversely, claimant requests the Board to affirm the Order. Claimant argues the evidence is uncontradicted that ascending and descending a set of steps 45 times per day is not an activity of day-to-day living and that it aggravated the arthritis in his *left* knee. Claimant also argues the April 29, 2008, incident involving his *right* knee was a natural consequence of the left knee injury and, therefore, compensable. Finally, claimant argues the Judge correctly determined the date of accident for claimant's repetitive trauma injury was June 4, 2008, under K.S.A. 44-508(d). Claimant summarizes his argument, as follows:

ALJ Avery found that Mr. Koci suffered a series of injuries to his left knee from climbing up and down the steps on the back of his truck. There is no evidence contradicting Dr. Koprivica and Dr. Gilbert on this issue. ALJ Avery found the date of accident to be June 4, 2008, pursuant to K.S.A. 44-508(d). His finding is consistent with prior Appeals Board decisions. The date of accident was June 4, 2008. Mr. Koci gave notice of the claim on that day, thus notice is timely. As a natural consequence of the compensable left knee, Mr. Koci injured his right knee. Dr. Koprivica's opinion that the left knee gave out because of the arthritic condition, resulting in additional injury to Mr. Koci's right knee, is uncontradicted.²

The issues before the Board on this appeal are:

1. Did claimant sustain personal injury by accident arising out of and in the course of his employment with respondent?

¹ Respondent's Brief at 10 (filed Oct. 7, 2008).

² Claimant's Brief at 16 (filed Oct. 17, 2008).

2. If so, did claimant provide respondent with timely notice?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned finds:

Claimant has worked for respondent and its predecessor for 26 years. For the last 15 years claimant's job has been that of a spot truck driver, which requires claimant to move trailers in respondent's lot so they can be loaded or unloaded at respondent's dock. Claimant worked four 10-hour days per week.

Claimant ascended and descended the steps on his truck approximately 40 times a day. The bottom step was approximately 14 to 15 inches above the ground, the next two steps were approximately 12 inches high, and the last step to the platform of the truck was four or five inches high.

In early April 2008, claimant began noticing pain and burning in his left knee. As he continued to work, the symptoms increased. Claimant noticed his left knee symptoms progressed during his workday and during the workweek. Towards the end of April 2008 the pain in claimant's left knee was significant and no longer subsided when he was not working.

On April 29, 2008, claimant injured his right knee at work when his left knee gave way while he was coming down the steps of his truck. Claimant described the accident as follows:

I was getting off my truck and coming down the steps, the last step I was on my left foot, my knee gave out, kind of launched me off to the side and I landed [on the ground] in an awkward way, jammed my right knee and I felt a popping and intense pain and it stopped me for a while and I just kind of slowly started moving again and . . .³

Despite that incident, claimant continued working. Later, claimant called his family doctor, who referred him to Dr. Michael J. Schmidt. Dr. Schmidt saw claimant on May 15, 2008, injected claimant's left knee with cortisone, sent claimant for a right knee MRI, and took him off work. After receiving the MRI results, Dr. Schmidt scheduled claimant for arthroscopic surgery on the right knee and proposed other treatment for the left knee.

³ P.H. Trans. at 20.

Claimant's right knee surgery was scheduled for June 6, 2008, but two days before that claimant's health insurance carrier advised claimant it was postponing the surgery because "somebody said it might be work related."⁴ Claimant then contacted respondent on June 4, 2008, reported his knee problems as being work-related and had an accident report prepared. According to claimant the accident report was signed on his behalf by respondent's Chris Eagle.

But this is not the first time claimant has experienced symptoms in his knees. In approximately 1991 claimant had a work injury and underwent *left* knee surgery. Claimant had a good result as his activities were not restricted when he was released from medical treatment and his left knee was asymptomatic until April 2008. In late 2002 claimant saw a doctor on two occasions for his *right* knee. The doctor diagnosed probable acute patella subluxation. After conservative treatment, claimant's right knee symptoms resolved.

As indicated above, claimant did not initially notify respondent his knee problems were due to a work-related accident. Claimant testified he did not know his knee problems were from a work-related accident as he had not injured his left knee in any specific accident at work.

As indicated above, claimant saw Dr. Schmidt on May 15, 2008, for bilateral knee pain. The doctor recorded that claimant had been having issues with his left knee "but apparently was kicking a block under a truck with his left leg when he felt a painful pop in his right knee."⁵ Claimant testified he does not know why the doctor refers to the 2002 incident with the block. And that testimony is buttressed by the May 15, 2008, records from the Tallgrass Imaging Center, which indicate claimant hurt his right knee on April 24, 2008, when he stepped off a truck and felt a pop in his right knee.

On August 11, 2008, claimant was examined at respondent's request by Dr. John H. Gilbert. The doctor diagnosed osteoarthritis in both knees and a torn right lateral meniscus. The doctor concluded claimant's osteoarthritis had multiple causes such as genetics, body habitus, and previous left knee surgery. Moreover, Dr. Gilbert thought claimant's work activities with repeated climbing represented some risk as well. The doctor, however, believed claimant's torn right lateral meniscus was caused by the incident when claimant was descending the steps of his truck.

On September 8, 2008, claimant was evaluated at his attorney's request by Dr. P. Brent Koprivica. The doctor determined claimant sustained repetitive trauma to his knees

⁴ *Id.* at 23.

⁵ *Id.*, Cl. Ex. 1.

from the repetitive climbing in and out of his spot truck. Likewise, the doctor determined the right knee was injured as a direct and natural consequence of the left knee injury.

The undersigned finds claimant sustained repetitive traumas to his knees from the repeated climbing of the steps to his truck. And based upon claimant's description of the April 29, 2008, incident, the undersigned finds the right knee injury is a direct and natural result of the repetitive trauma and resulting injury to the left knee. The undersigned finds Dr. Koprivica's opinions persuasive.

CONCLUSIONS OF LAW

The parties did not stipulate to the date of accident. Consequently, the date of accident for this repetitive trauma claim must be determined before the issue of timely notice can be addressed.

Effective July 1, 2005, the Workers Compensation Act was modified to set the date of accident for repetitive trauma injuries. In short, K.S.A. 2007 Supp. 44-508(d) provides that the accident date for a repetitive trauma injury is the date an *authorized* doctor either prohibits a worker from working or the date the *authorized* doctor restricts the worker from performing the work that caused the repetitive trauma injury. If the worker is not taken off work or restricted, then the accident date is the earlier of when the worker gives written notice to the employer or the date the worker's condition is diagnosed as being work-related, if that is communicated in writing. And if none of those situations apply, then the date of accident is the date determined by the administrative law judge based upon the evidence.

The undersigned affirms the Judge's finding that June 4, 2008, is the appropriate date of accident for claimant's bilateral knee injuries. As indicated above, claimant notified respondent on that date that his knee problems were related to his work and a written accident report was then prepared and signed on claimant's behalf. Consequently, claimant provided respondent with timely notice of his accident.⁶

In conclusion, claimant's bilateral knee injuries arose out of and in the course of his employment with respondent. And claimant provided timely notice of those accidental injuries. Accordingly, the September 18, 2008, Order for Compensation should be affirmed.

⁶ See K.S.A. 44-520.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁷ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned affirms the September 18, 2008, Order for Compensation entered by Administrative Law Judge Brad E. Avery.

IT IS SO ORDERED.

Dated this ____ day of November, 2008.

KENTON D. WIRTH
BOARD MEMBER

c: Mitchell D. Wulfekoetter, Attorney for Claimant
James C. Wright, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

⁷ K.S.A. 44-534a.